United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

799A

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22689

UNITED STATES OF AMERICA, APPELLEE,

V.

JOHN C. GARNER, JR. APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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TABLE OF CASES

* Cases and law chiefly relied upon are marked by asterrisks.

*STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Court below erred in not reviewing the identification problems before or at the time of trial and again on the motion for a new trial under the rule set forth in Wade, Gilbert and Stovall.

2. The Court below erred in not granting a judgment of acquittal for insufficiency of evidence.

3. The Court below erred in allowing irrelevant evidence on the record concerning appellants activities from the time of the robbery and for three days thereforth.

4. The Court below erred in not allowing demonstrative evidence regarding the identification of appellant and allowing the prosecution to lead his witnesses.

5. The Court below erred in making the Sentences in Counts I and 2 of the indictment consecutive.

REFERENCE TO RULINGS

6. The Court below made no specific ruling on any law during trial however, by denying the motion for a new trial did reject the Wade-Gilbert and Stovall agreement regarding identification.

* This case has not been before this Court before under this or any other title.

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STATEMENT OF CASE

On October 23, 1968, appellant was convicted of Robbery and eleven (11) counts of assualt with a dangerous weapon in violation of Title 22, District Of Columbia Code, Section 502 as charged in Counts 2,3,4,5,6,7, 8, 9,10,11 and 12.

The Robbery was alledged to have been committed by appellant on

June 11, 1968, at Embassy Dairy with two other persons.

The other two person were alledged to have been armed with pistols and appellant was alledged to have been armed with a sawed-off shotgun.

Appellant was also alledged by some of the witnesses to have been wearing a stocking mask. He was alledged to have been wearing only a cap on his head by other witnesses.

Appellant was tried by a Jury on October 21,22 and 23, 1968, and found guilty of 12 counts of a 13 count indictment. The 13th count of the indictment was taken from the jury to the Court.

A motion for a new trial or a judgment of acquittal was heard on December 20, 1968,and was denied as to all remaining counts.

Appellant was sentenced on December 20, 1968 to five to fifteen years on count 1 and 3 to 9 years on count 2 to run consecutively with count 1, and was sentenced to 3 to 9 years on counts 3,4,5,6,7,8,9,10,11, and 12 to run concurrently with the sentence in count 2.

Defense Counse filed an addendum to the motion for a new trial or judgment of acquittal, citing among other things the Wade, Gilbert, Stoval problem of identification at a Pre-Traial confrontating with affidavits of the appellant and his mother, Janie Garner concerning the Pre-Trial confrontation of the identification witnesses.

This was done after appellant counsel call this problem to Defense Counsel and advised him of the law governing identification in Post Wade case. Appellant's Counsel urged this move upon Defense Counsel in order to give the Court an opportunity to review any identification problems which were not resolved during trial.

The motion and the adendum was denied on December 20, 1968.

I - Pre-Trial and In Court

Identifications. (TR 13,22, and 31 and affidavits of Janie A. Garner and John C. Garner and Motion for new trial.

In three cases decided June 12, 1967, the Supreme Court brought into focus its concern with the manner in which Pre-Trial identifications are frequently made.

In United States V. Wade, 388 U.S. 218 1967, and Gilbert V. California, 388 U.S. 263, 1967, which involved lineups. The Supreme Court found that the lineup was a critical stage in the criminal proceedings at which the accused were constitutionally entitled to have their lawyers present under the sixth amendment right to counsel.

In Wade the Supreme Court sent the case back for a resolution by the District Court to determine whether the in-court identifications had an independent origin, and in any event, the introduction of the evidence was harmless erros under Chapman V. California, 386 U.S. 18 (1967)

In Wade as in the case at Bar, the federal prosecution included only in-court identifications and the lineup identifications had been brought out on cross examination.

In the Case at Bar the Defense Counsel at TR-13 raised the question of out of Court identification in questioning Mr. James F. Lawrence.

Q. Now, were you ever able to identify any of the persons in the hold-up?

A. No Sir.

At this point no error was made, however it was appearant that an identification problem existed and should have been recognized by all parties concerned.

This same question came to attention of the Court and Counsels again at TR 22 in the cross examination of Janet Boyer where Defense Counsel went into Pre-Trial identification, including photographs and a lineup.

At this point counsel was called to the bench and the Judge specifically told Defense Counsel that he had brought it out.

At this point,or before,the Court should have held a Wade, Gilbert, Stoval hearing of all witnesses.

In Clemons V. United States of America- U.S. app. D.C. No. 19,846, Clark V. United States of America- U.S. app D.C. No. 21,249 and Hines v. United States of America- U.S. app D.C. No. 21,249 on hearing En Banc Decided December 6, 1968, this court states at page 9, that under Wade and Gilbert identifications:

> "Whenever the Prosecution proposes to make eyewitness identification a part of its case, the defense is entitled to know, through disclosure by the Prosecution or by evidential hearing outside the presence of the jury, the circumstances of any pre-trial identification. If it was one where the court (emphasis added) finds that the sixth amendment right to counsel existed, but was not observed, the prosecution may not, under the per se exclusionary rule enunciated by the Supreme Court in Gilbert, offer such identification as part of its case;..."

This Court went on to compare post Stovall cases, (See note 4, Page 9) The Court state at Page 9:

> " If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source;..." (see addendum to Motion for new trial and/or judgment of acquittal.

(Also see affidavits of Janie A. Garner and John C. Garner, Jr., in which they stated that appellant was in a lineup with only two other boys who were dressed much differently and were much smaller.

It appeared that the prosecution was of the opinion that Defense Counsel

was at the lineup, however it is clear at TR 31 it became evident that Defense Counsel was not present and the lineup and there is no evidence that any attorney was present.

II. Insufficienty of Evidence
(The complete Record especially TR 38, 44,99,100 and 101.)

It appears from the record that the evidence was insufficient to give this case to the Jury.

Only three persons out of eleven were able to identify the appellant, and it must be pointed out that these three were the only ones able to identify appellant at the lineup which consisted of from three to four persons. (See affidavits of Janie A. Garner and John C. Garner Jr., and TR. 44).

Regarding the photographs, at TR 38, the question of them came up and during the course of the conversation the prosecution could not find the photographs of appellant and a duplicate had to be brought in. It appears therefore that the government was unable to show that the original photograph was ever found.

It also appears from the testimony at TR 46 that the photographs were marked in such a way as to indicate that all persons in the photographs had been arrested or even perhaps convicted of crime. This would tend to give the impression that they were looking only at known criminals, which would by necessity detract from a fair identification.

The question would arise; why not pick one, they are all crooks anyway?

The witness, Mr. Higgins at TR 99, 100 and 101, who was on the floor directly under the man with the shotgun, who was identified as the appellant. Mr. Higgins was unable to identify appellant and stated positively that he did not have anything on his face.

It appears, therefore, that the evidence is so insufficient that it should not be submitted to the Jury. The motion for judgment of acquittal for all counts should have been granted.

III. Irrelevant Evidence
(TR 115 to 219 inclusive)

Defense Counsel attempted to show by way of alibi evidence that appellant could not have committed the crime in questions.

However, as it turned out the evidence, beginning with Mrs. Janie Garner at TR 115 and continued to TR 219 was nothing more than irrelevant testimony.

It began with Mrs. Janie Garner's testimony that appellant left home at about 10:00 A.M., (the time of the robbery) and continued with his activities for the next three days.

The Court issued Subpoenas for witnesses from North Carolina for this purpose and should have inquired as the purpose.

After having found out the purpose, the court on its own motion should have objected and sustained its objection.

All this testimony did was to support or give strength to the government case and should not have been allowed.

This is, of course, not to say that the court should conduct the defense, but should have some information regarding the testimony of any witnesses especially those brought from other States.

The practice now is the District Court, is to hold Pre-trial hearings to ascertain issues and need for witnesses etc. If this practice was in effect when this case came to trial it would appear that the court bellow would not have allowed such evidence on the record.

IV. Demonstrative Evidence and Leading Of Witnesses
(TR 16, 59, 95 and 96

At TR 95 Defense Counsel requested the Court to be allowed to

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A. He was standing in about the center of the room,

Q. What was he doing?

A. He had a sawed off shotgun and he was standing there pointing the gun at the people which were more or less standing on the side.

Q. Now, can you identify the man who held the shotgun?

A. Yes Sir,

Q. Would you look around the Courtroom and tell the ladies and gentlemen of the Jury if you can see him now.

A. Yes Sir,

Q. Point him out.

A. Over there in the gold sweater, pointing toward the defendant.

This line of questioning appears to be aimed only at the attention of one person in the Courtroom, who happens to be the defendant. And implicating by the question, that he is the only one the Prosecution is interested in. And by so doing, implying that the defendant is the one who was carrying a shotgun. The question therefore, is much more than merely leading the witness, it plants in the mind of the Jury that the person sitting at the table is in fact, the person carrying the shotgun. Had all three person been present in the Courtroom during this trial, some other implication might have been drawn from the question, directing the witness's attention to a specific person or to what a specific person was doing, since all would have been present. Each one then could have been examined or the actions of each one could have been examined without prejudice to either one. However, since only the person who was alledged to have carried the sawed-off shotgun was present and which had not been established by any prior testimony, Counsel contends that it is inescapable that this question is not only leading, but places undue emphasis on the defendant.

It appears, therefore, that the evidence is so insufficient that it should not be submitted to the Jury. The motion for judgment of acquittal for all counts should have been granted.

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IV. Demonstrative Evidence and Leading Of Witnesses
(TR 16, 59, 95 and 96

At TR 95 Defense Counsel requested the Court to be allowed to

demonstrate a person of similar built and similar look as the defendant with the stocking mask covering his face for the benefit of the jury. In so doing it appears that that he intended to demonstrate to them whether or not the identifying testimony of the several witnesses were reliable in their opinion.

In my opinion this demonstration which was disallowed at TR 96, by the Court was in error. The Court state that it would allow the demonstration only if the same one was used. Any attempt to make an identification demonstration by the case of the same stocking mask placed the defendant in the position of knowing when, where and how this robbery took place, and in having evidence about the robbery.

At the very least he would be in a position of withholding evidence which is crucial to this trial. At the most he would be placed in a position of testifying against himself.

It is not inconceivable that even the prosecutions own witnesses could have obtained a stocking similar to the one they had described and allowed the jury to view that for their own observation, thereby giving them a better idea of what an individual looks like in a stocking mask. Since it cannot be presume that they have common knowledge of such an experience, it seems only proper that such a demonstration should have been allowed in order to give appellant a fair trial based on facts rather than conjecture.

In the questioning on direct examination Miss Janet Irene Boyer at TR 16 Defense Counsel raised the question to whether the prosecution was leading the witness, it was ruled, I don't think so, I'll let her answer it. The Prosecution after it was established there were three men, one had a sawed off shotgun and two had pistols, he asked the question "Now, what if you recall, was the man who had the shot gun doing, Defense Counsel, I think that is leading, Court, I don't think so I'll let her answer,

an emphasis which sould not be present in a fair trial. Places in the minds of the Jury, very strong implications by the Prosecution's own question, even before the witness answers, that this is the man carrying the shotgun and that his only interest in drawing an identification from the witness. The Prosecution, thereby, leaves little for the witness to state, except, to merely confirm the implication he has made by his own question.

In TR 59, Miss Boyer was questioned again by the Prosecution, the question was, what if anything did the man with the shotgun do?

A. Stood there waving it back and forth, like he was trying to cover the whole wall or something.

This question is in the same light as the question to the previous witness, which singled out and placed undue emphasises toward one particular person out of three. The only one before the Court leaving one one question for the witness; a positive in-court identification!

V. CONSECUTIVE SENTNECES

Even if the appellant is guilty of robbery and assault with a dangerous weapon, the act as shown by each of the government's witnesses clearly proved that the acts were uninterrupted and falls under the rule set forth by this Court in Irby V. United State, _____U.S. App.D.C. 390 F.2d 432, (1968).

The testimony of each witness clearly indicates that the man with the shotgun (alledged to be appellant) took no actual part in the robbery, except the assault, which if committed was clearly a part of the robbery.

This Court also referred to this problem again in Jackson V. United States of America, _____U.S. app.____, No. 21, 327. Decided February 3, 1969, pp.8-9, although affirming on other grounds.

Chief Judge Bazelon stated on P. 8 trial:

> " There is a clear interest in preventing the State from punishing separately for technically District offenses arriving out of the same transaction. However, the decisions of this court have made it apparent that this goal is further persuaded not by preventing the submission of the different charges to the jury, but by forbidding consecutive sentences in appropriate circumstances. See Fuller V. United States Draft opinion at PP. 12-13 (1968) (en banc);...."

It is therefore urged that should this be affirmed on the other issues presented, that the Court be ordered to change the sentence to one which complys with the rule of this Court.

CONCLUSION AND RELIEF SOUGHT

Counsel contends that deprived of his sixth amendment right to Counsel at the Pre-Trial confrontations and was not given a fair hearing on these confrontations and the later in-court identifications as required by Wade, Gilbert and Stovall.

Counsel therefore prays that this honorable Court will remand this case to the United States District Court for a new trial.

Counsel, further, contends that the consecutive sentences of counts I and 2 of the indictment is contrary to the saw as set forth by this court in the Irby case. Counsel therefore, prays that this honorable Court will remand this case to the United States District Court for resentencing

Respectfully submitted,

James W. Respess
Attorney For Appellant

NOTIFICATION OF SERVICE

I CERTIFY THAT A COPY OF THIS BRIEF WAS DELIVERED TO THE UNITED STATE' ATTORNEY FOR THE DISTRICT OF COLUMBIA THIS 14th DAY OF JULY, BY LEAVING A COPY WITH HIS DULY AUTHORIZED REPRESENTATIVE AT THE UNITED STATE COURT HOUSE, WASHINGTON, D.C.

JAMES W. RESPESS